



DEPARTMENT OF THE ARMY
UNITED STATES ARMY LEGAL SERVICES AGENCY
9275 GUNSTON ROAD
FORT BELVOIR, VA 22060-5546

JALS-EL

22 July 2016

MEMORANDUM FOR Army Records Management and Declassification Agency,
Records Management Division, 7701 Telegraph Road, Alexandria, VA 22315-3860

SUBJECT: Litigation Hold – *In re: Fitzsimmons v. United States*, No. 16-519C, No. 1:16-cv-0967-RPM-KLM (D.Colo.)

1. A Complaint has been filed against the U.S. Army for response costs, pursuant to the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), §§ 107 and/or 113 based on the U.S. Army's alleged contribution to the release of hazardous substances located at the former Fitzsimmons Army Medical Center site (the "Site") in Aurora, Colorado. The U.S. Department of Justice has requested that the Department of the Army ("Army") implement a Litigation Hold to preserve any potentially relevant information, including electronically stored information ("ESI") and tangible things, pertaining to the Site. Specifically, the Army must preserve potentially relevant information associated with the use and redress of asbestos at the Site between January 1, 1997 to the present.
2. In its Complaint, the Fitzsimmons Redevelopment Authority ("FRA") requests the recovery of costs incurred by FRA to clean up contaminated soils on property that it purchased from the Army through the Base Realignment and Closure program. After purchasing property from the Army, it was discovered that the soil at the property was contaminated with asbestos. FRA has spent over \$12 million to clean up the asbestos contaminated soils and estimates that it will incur additional cleanup costs of over \$6.2 million in the near future.
3. On March 23, 1999, FRA and the Army executed a Memorandum of Agreement ("MOA") that provided for the sale by the Army and purchase by FRA of 332 acres at the Site. Under the MOA, the Site was to be conveyed to FRA between 1999 and 2003 in a series of conveyances. It was necessary to deed the land in a series of conveyances because certain parcels of the land required additional cleanup efforts and, pursuant to law, the Army could not deed the properties until the environmental cleanup was complete. FRA acknowledges that the Army disclosed that there were certain environmental risks that had to be contained, including the presence of asbestos in the buildings and structures at the Site. FRA alleges that the Army concealed that the Site included soil contaminated with asbestos, and, as a result, has incurred substantial cleanup costs delaying construction at the Site.
4. Duty to Preserve Potentially Relevant Information.

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Federal law imposes an obligation on this agency and its employees to preserve potentially relevant information. Appropriate steps must be taken to preserve any such information that is in the possession, custody, or control of the Army. This information must be preserved even if it otherwise could be destroyed, deleted or overwritten in the normal course of Agency operations. If information that is subject to a litigation hold is destroyed, a court in some circumstances may impose sanctions, exclude evidence, and/or dismiss a claim.

5. What Must Be Preserved.

All paper, technical manuals, microfiche, photographs, and other non-electronic and tangible information should be preserved in its original form. With respect to ESI, such information should be maintained and preserved in its original "native" format. ESI includes but is not limited to, computer files of any type, including word processing documents, e-mail messages, text messages, and other electronic communication, spreadsheets, databases, calendar entries, telephone logs, digital photographs or other digital images; floppy discs, CDs, DVDs, and flash memory media, including USB drives and memory cards for cameras and cell phones; internet usage files; network access information; and information on other kinds of media. It includes not only information stored on agency computers but can also include information stored on home computers, personal laptop computers, PDAs such as Palm Pilots, Smart Phones, and Blackberries, and other mobile phones, if used for work.

6. Relevant information and documents may include those relating to the following topics:

- a. Deeds of trust, quit claim deeds, promissory notes, and any other documents involved in conveying the land to the Fitzsimmons Redevelopment Authority (FRA);
- b. The Memorandum of Agreement, dated March 23, 1999, and any documents relating to this Memorandum of Agreement;
- c. The Environmental Baseline Survey, and documents relating to this survey, and any other environmental surveys or studies conducted on the property;
- d. Communications with FRA regarding contaminated soils, and any contemporaneous communications with FRA regarding the condition of the property that was conveyed to FRA;
- e. Documents establishing what the Government knew about the condition of the property that was conveyed to FRA;
- f. Any claims or demands issued by FRA to the Government, and all documents regarding those claims or demands;

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g. Any mediation or other ADR undertaken to attempt to resolve the dispute.

7. What Must be Done.

a. Ensure this Litigation Hold is distributed to all organizations and personnel who may be involved in, or have information pertaining to this potential litigation. Based on current information, the following Army commands and activities may be in possession of potentially relevant documents and information:

- (1) U.S. Army Corps of Engineers;
- (2) U.S. Army Materiel Command;
- (3) U.S. Army Environmental Command;
- (4) U.S. Army Medical Command;
- (5) U.S. Army Contracting Command;
- (6) U.S. Army Medical Department Center and School;
- (7) U.S. Army Reserve Command;
- (8) U.S. Army Claims Service;
- (9) U.S. Army Legal Services Agency, Base Realignment and Closure Team.

b. If you are aware of other Army commands, installations, offices or personnel who may have information about, worked or are working at Army facilities at or near Aurora, Colorado, or whom you otherwise believe may have custody or knowledge of potentially relevant information, immediately contact them and provide them with this Litigation Hold and notify the applicable Records Manager, the Staff Judge Advocate or legal advisor and the Environmental Law Division (ELD) POC below.

8. Do not dispose of, shred, or otherwise destroy potentially relevant non-electronic information or tangible items. In addition, the following steps should be taken to ensure the preservation of relevant and potentially relevant ESI.

- a. Seek assistance from information technology (IT) personnel as necessary.
- b. ESI should be preserved in such a way as to preserve "metadata" (internal computer data) embedded in the ESI.
- c. Ensure the preservation of relevant information in systems and databases that might be updated, archived, or deleted automatically or in accordance with a set schedule.
- d. Before any computer, tablet, smart phone, blackberry, PDA, or other electronic device, drive or system that contains relevant information is retired, reimaged, or upgraded, ensure potentially relevant information is preserved and accessible.

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e. Ensure that relevant ESI contained in PSTs and other personally accessible drives, databases, and programs are preserved when there are staffing changes, retirements, departures, suspensions/terminations or other personnel actions related to individuals with potentially relevant information. When new personnel become involved in actions that might result in the creation, receipt or maintenance of potentially relevant information, they should be informed of the requirements of this Litigation Hold.

f. Treat non-identical copies of documents (word processing files, spreadsheets, etc.) as if they were unique and save, at a minimum, the latest version and all versions that were shared with others.

g. If there is a need to work with any information subject to this Litigation Hold, a copy of the original should be made to work with, while preserving the original information. Note that opening an electronic document can change the document's metadata. Take appropriate steps, if practicable, to create a copy without changing the document's metadata.

h. If potentially relevant ESI has been lost, then immediately contact IT personnel to determine if any steps can be taken to retrieve the information.

9. Maintain information subject to this Litigation Hold in an orderly, readily retrievable manner, keeping confidential and/or privileged information separate from publicly releasable information, and be prepared to provide materials subject to this Litigation Hold for review and/or production as needed for any subsequent case development, settlement discussions, alternative dispute resolution, privilege log preparation, discovery, pre-trial activities, and trial.

10. Prior to the transfer of any potentially relevant information to a Records Holding Area, Federal Records Center, National Archives, or any other location, the Records Manager and Staff Judge Advocate or legal advisor should agree the information will be adequately preserved after being transferred and is not needed in its present location for purposes of this matter.

11. In accordance with 36 CFR Part 1228, a "Record Freeze" should be implemented to preserve any potentially relevant information that has already been transferred to a Record Holding Area, Federal Records Center, National Archives or any other location.

12. The Freeze should preserve all potentially relevant Army records within record groups 77, 112, 153, 203, 335, 544, and 551 that contain file or record numbers related to the use of asbestos or the transfer of property at the Site located in Aurora, Colorado.

13. Records Administrators/Managers must ensure all records presented for destruction do not meet any of the criteria associated with this preservation request. If

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any permanent records have already have been accessioned to the FRCs, please check the SF135s for relevant long term records. Provide a copy of any SF135 that might identify accessions with potentially relevant records to the Staff Judge Advocate or legal advisor, and the ELD POC below.

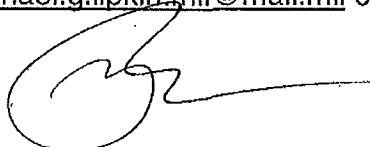
14. Failure to preserve and maintain potentially relevant information may result in sanctions against the U.S. Government and individuals personally. Consequently, if there is any uncertainty as to whether information should be preserved, err on the side of caution and preserve the information. Supervisors should monitor and take all reasonable steps to ensure the personnel they supervise comply with these instructions.

15. I represent the Department of the Army in this matter. Please advise me if any other organizations or personnel may have potentially relevant documents. If Army personnel are contacted by anyone outside the Army concerning this matter, please refer them to me. Army personnel are encouraged to coordinate their efforts in responding to this request with their servicing legal office.

16. In order to track implementation of this Litigation Hold, please acknowledge receipt of this Litigation Hold on an Acknowledgement Form to be provided by RDMA. In addition, send an acknowledgement email to the following ELD POC:

Ms. Jennifer Meadows, Paralegal Specialist
Email: Jennifer.I.meadows.civ@mail.mil
Phone: (703) 693-0441

17. If you have any questions or comments, please do not hesitate to contact Ms. Jennifer Meadows or myself at michael.g.lipkin.mil@mail.mil or (703) 693-0624.



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